

REMARKS

In the pending Office Action, Examiner Snow made an election requirement, alleging species which he characterized as follows:

- 1) Method comprises a motion preserving device
- 2) Method comprises a fusion device (not a motion preserving device)

The above categorization is taken verbatim from the requirement for the sake of clarity, and is not intended as an admission of any sort as to the subject matter of any claim. Examiner Snow requested an election of a single species, and added his opinion that no claims are generic.

With due respect, the similarities between the categories allow them to be efficiently searched and examined together. If “classification is the same and the field of search is the same and there is no clear indication of separate future classification and field of search, no reasons exist for dividing among independent or related inventions.” MPEP 808.02. The requirement did not allege that the classification of the alleged method species is different, and such species of method would be commonly classified. The requirement asserted three bare conclusions as to field of search, applicability of art, and non-art issues, joined by the ambiguous conjunction “and/or,” without supporting evidence. It is not apparent from the record that searching would be necessary for one species “that is not likely to find art pertinent to the other.” *Id.* Rather, a practical and reasonable search strategy for either species would find references pertinent to both. Finally, there is no basis to believe that the alleged species would be separately classified or searched in the future. No patents or other evidence of a separate field of search was provided, as MPEP 808.02 requires. Respectfully, the election requirement did not show by appropriate explanation either separate classification, separate status in the art, or different fields of search.

So as to give a complete response for the sake of efficiency, Applicant chooses to provisionally elect species associated with methods including a motion preserving device, **with traverse** on at least the above grounds. Given the breadth of the specification and the claims, at least claims 1-19, 21-34 and 72-73 read on that subject matter. Further, at least claim 19 is generic to the species alleged in the election requirement, as it does not specify either a motion preserving device or a non-motion-preserving device.

Applicants do not concede the propriety of the Examiner's request, and do not intend to limit in any way the scope of the claims or this application with the statements or provisional election herein. Specifically, the claims in this application should be given the full scope permitted by their language. Applicant reserves the right to later assert that other claims read on the provisionally-elected species as well, especially if the election requirement is not withdrawn. No amendments have been made to the claims in this paper.

Examiner Snow also requested a clarification as to how the elected embodiment shown in at least Figure 1 can function as a motion preserving device. The embodiment of Figure 1 shows an expandable device (e.g. item 30) and an expandable balloon (50/55). It was indicated at least in the response to restriction and election requirement filed on April 17, 2006 that a motion preserving device as in claim 1 was shown in one embodiment as item 270 (see, e.g., Figure 33). Further, paragraph 74 discloses that item 55 can be filled with filler material to preserve motion. If the Examiner would like to discuss this further, the favor of a telephone interview is requested.

Examiner Snow further requested that several of the claims be denoted as "withdrawn."

That change has been made due to his request, but that change does not indicate an

RESPONSE TO ELECTION REQUIREMENT

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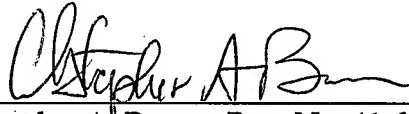
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acknowledgement that such withdrawal is proper. All of the pending claims should be considered at least for the reasons given in prior filings in this case.

In conclusion, Applicant has made a provisional election as noted above with traverse. Examiner Snow is respectfully requested to reconsider his election requirement and withdraw it. An Office Action toward a Notice of Allowance in this case is respectfully solicited.

Respectfully submitted,



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